

Appeal of David G. Bertrand

The sole issue in this appeal is whether appellant may properly exclude from his gross income the amounts received as disability retirement income in 1978 and 1979.

Appellant was employed by the State of California. until May 21, 1974, when he retired with a disability following an on-the-job injury. At the end of the taxable year in which **appellant** was disabled, he was 48 years old. Appellant's pension was determined by his retirement age, length of service, and prior contributions.

After appellant failed to include his disability retirement income in gross income on his 1978 and 1979 personal income tax returns, respondent issued Notices of Additional Tax Proposed to be Assessed (**NPAs**) ~~for~~ those **years** including the **disability** retirement income in gross income. Appellant protested and, after a review, the **NPAs** were affirmed. This timely appeal followed.

Appellant contends that his disability retirement income is properly excluded from gross income because the payments are for the permanent loss or loss of use of a member or function of the body. Appellant claims that if the payments are not considered disability income, they should be considered worker's compensation and, therefore, exempt from tax. Appellant also argues that the Internal Revenue Service's (IRS) determination for prior years should be followed, allowing the income to be exempt from tax.

Respondent contends that disability payments made to appellant are not exempt from taxation because the income is not from health or accident insurance for the permanent loss or loss of use of a member **or function of the** body, but rather it is retirement income. Additionally, the amount of the payments -was not computed on the basis of the injury appellant sustained, but on his length of service, age, and prior contributions. Respondent does not consider appellant's income worker's compensation because the payments were not made solely because of the injuries or sickness sustained. Respondent points out that appellant has failed to provide any substantiation, including a statement from his physician, that his injury left him permanently and totally disabled. Finally; respondent's position as to the federal determination is that each year must stand on its own and that determinations for prior years have no effect on the years **at** issue.

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Section 17139, subdivision (c)(1), excludes payments received by a taxpayer through accident and health insurance which constitute payment for the permanent loss or loss of use of a member or function of the body, the amount being computed with reference to the nature of the injury.

Appellant's disability income is not from health or accident insurance for the permanent loss or loss of use of a member or function of the body, but is retirement income. The amount of the payments was not computed on the injury sustained by appellant, but on length of service, age, and prior contributions. Therefore, we must conclude that section 17139, subdivision (c)(1), does not apply to appellant's **situation**.

It is for the same reason that appellant's disability income is not considered worker's compensation. Such payments must have been made solely because of injuries or sickness sustained. (DeBiasi v. Commissioner, ¶ 83,161 T.C.M. (P-H) (1983).) The payments **appellant** received were not computed to any extent upon the injury he sustained.

Section 17139, subdivision (d)(1),^{3/} provides, in pertinent part, that:

(1) In the case of a taxpayer who --

(A) Has not attained age 65 before the close of the taxable year, and

(B) Retired on disability and, when he retired, was permanently and totally disabled, gross income does not include amounts . . . [which] . . . constitute wages or payments in lieu of wages for a period during which the

^{3/} Section 17139, subdivision (d), was amended twice during the years at issue. As a result of the amendments in Assembly Bill 302 (Stats. 1977, ch. 1079, § 24, p. 3310), operative for taxable years beginning in 1977, subdivision (d) was amended to provide for a phase-out of disability exclusions. As a result of the passage of Assembly Bill 93 (Stats. 1979, ch. 1168, § 10, p. 4416), operative for taxable years beginning on or after January 1, 1979, subdivision (d)(4) was renumbered and **amended** as subdivision (d)(5). None of the amendments are pertinent to the issues raised in this appeal.

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employee is absent from work on account of permanent and total disability,,

* * *

(4) . . . an individual is permanently and **totally disabled** if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months, An individual shall not be considered to be permanently and totally disabled unless he furnishes proof of the existence thereof in such form and manner, and at such time as the Franchise Tax Board may require. [Emphasis added.]

At the hearing held by respondent, appellant informed respondent's auditor that his injury disabled him permanently, but not **totally**, and that he was capable of being employed. According to respondent, appellant has provided a statement from his doctor explaining the disability but which did not indicate that appellant was permanently and totally disabled. Although respondent made several Subsequent written and oral requests of appellant and his doctor for such a statement, none were ever submitted.

Appellant has never provided respondent with proof that he is permanently and totally disabled. Until and unless he does **so**, he does not qualify under section 17139, subdivision (d). We must, therefore, conclude, on the basis of the evidence presented, that the disability payments made to appellant are not exempt from taxation because the income is not from health or accident insurance for permanent loss or loss of **use** of a member or function of the body, nor was it computed on the basis of the injury appellant sustained. As **such**, it is properly characterized as retirement income.

Appellant also argues that respondent should allow the deduction because it was allowed by the IRS and **the virtual** identity of the federal and state statutes controlling the availability of the exemption renders the **IRS's** allowance of the exemption determinative. We disagree. Although appellant claims the IRS allowed the deduction, the evidence presented does not reveal whether the IRS considered the question. The IRS may have

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accepted the return as filed and allowed the exemption without any scrutiny. In any event it is well established that respondent and this board are not bound to adopt the conclusion reached by the IRS in any particular case, even when the determination results from a detailed audit. (See Appeal of Raymond and Rosemarie J. Pryke, Cal. St. Bd. of Equal., Sept. 15, 1983; Appeal of Der Wienerschnitzel International, Inc., Cal. St. Bd. of Equal., Apr. 10, 1979.)

For the reasons stated above, we conclude that respondent's action in this matter must be sustained.

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O R D E R

Pursuant to the views expressed in the opinion of 'the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of David G. Bertrand against proposed assessments of additional personal income tax in the amounts of **\$106.00**, \$478.85, and **\$1,052.00** for the years **1977**, 1978, and 1979, respectively, be and the same is hereby modified to reflect respondent's withdrawal of the assessment for 1977. In all other respects, the action of the Franchise- Tax Board is sustained.

Done at Sacramento, California, this 30th day of July , 1985, by the State Board of **Equalization**, with Board Members Mr. Dronenburg, Mr. Collis, Mr. Bennett, Mr. Nevins and Mr. Harvey present.

<u>Ernest J. dronenburg, Jr.</u>	, Chairman
<u>Cqnway H. Collis</u>	, Member
<u>William M. Bennett</u>	, Member
<u>Richard Nevins</u>	, Member
<u>Walter Harvey*</u>	. Member

*For Kenneth Cory, per Government Code section 7.9